

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:)
)
ITT EDUCATIONAL SERVICES, INC., *et al.*¹) Case No. 16-07207-JMC-7A
)
Debtors.) Jointly Administered

**TRUSTEE’S MOTION TO COMPROMISE
AND SETTLE CERTAIN CLAIMS ASSERTED AGAINST ITT’S FORMER
CHIEF EXECUTIVE OFFICER AND ITT’S FORMER BOARD OF DIRECTORS**

Deborah J. Caruso, the chapter 7 trustee in this case (the “Trustee”), by counsel, requests, pursuant to 11 U.S.C. §§ 105(a) and 363 and Rule 9019 of the Federal Rules of Bankruptcy Procedure, entry of an order substantially in the form attached hereto as **Exhibit A** (the “Proposed Order”), approving the terms of a proposed settlement by and between the Trustee, acting for and on behalf of the Affiliated Debtors (as defined below), and each of the Affiliated Debtors’ respective bankruptcy estates, on the one hand, and on the other hand, ITT’s former Chief Executive Officer Kevin Modany (“Modany”), and eight individuals who served as members of ITT’s board of directors (the “Board”) during all or part of the period beginning on April 20, 2016 and ending with ITT’s September 16, 2016 bankruptcy filing: John E. Dean (“Dean”), C. David Brown II (“Brown”), Joanna T. Lau (“Lau”), Thomas I. Morgan (“Morgan”), John Vincent Weber (“Weber”), John F. Cozzi (“Cozzi”), Samuel L. Odle (“Odle”), and Jerry M. Cohen (“Cohen,” and together with Dean, Brown, Lau, Morgan, Weber, Cozzi, and Odle, the “Directors” and, collectively with Modany, the “Defendants”), on the other hand, which is embodied in a certain settlement agreement (the “Settlement Agreement”), a copy of which is attached hereto as **Exhibit B**, on the following grounds:

¹ The debtors in these cases, along with the last four digits of their respective federal tax identification numbers are ITT Educational Services, Inc. [1311]; ESI Service Corp. [2117]; and Daniel Webster College, Inc. [5980].

I. JURISDICTION

1. The Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b).
2. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory predicates for relief are sections 105 and 363 of the United States Code (the “Bankruptcy Code”) and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

II. BACKGROUND

4. On September 16, 2016 (the “Petition Date”), ITT Educational Services, Inc. (“ITT”), ESI Service Corp. (“ESI”) and Daniel Webster College, Inc. (“DWC,” and together with ITT and ESI, the “Affiliated Debtors”) filed voluntary petitions for relief under chapter 7 of the Bankruptcy Code. The Trustee was appointed interim trustee under section 701 of the Bankruptcy Code in each of the Affiliated Debtors’ bankruptcy cases on the Petition Date, and in accordance with section 702(d) of the Bankruptcy Code, became the permanent case trustee on November 1, 2016 following the conclusion of the meeting of creditors held pursuant to section 341(a) of the Bankruptcy Code.

5. On October 4, 2016, the Court entered its *Order Granting Motion for Joint Administration of Chapter 7 Cases* [Docs 221 & 222], directing the Affiliated Debtors’ bankruptcy cases to be jointly administered for procedural purposes only.

6. On May 31, 2018, the Trustee commenced an adversary proceeding with this Court, captioned *Deborah J. Caruso, as Chapter 7 Trustee for ITT Educational Services, Inc., ESI Service Corp. and Daniel Webster College, Inc. v. Kevin Modany, John E. Dean, C. David Brown II, Joanna T. Lau, Thomas I. Morgan, John Vincent Weber, John F. Cozzi, Samuel L. Odle, and Jerry M. Cohen*, Adv. Proc. No. No. 18-50100 (the “Adversary Proceeding”),

asserting claims against the Defendants for alleged breach of fiduciary duty and equitable subordination of claims arising from Defendants' alleged breach of their fiduciary duties of loyalty, care, and good faith owing to ITT and its stakeholders during the period April 20, 2016 until ITT's bankruptcy filing on September 16, 2016.

7. On June 28, 2018, the Directors filed a motion in the Adversary Proceeding seeking to withdraw the reference, and on January 7, 2019, the United States District Court for the Southern District of Indiana (the "District Court") entered an Order withdrawing reference of the Adversary Proceeding pursuant to 28 U.S.C. § 157(d), after which the proceeding was transferred to the District Court under Case No. 1:18-cv-02182-JPH-TAB (the "District Court Case").

8. On May 23, 2019, Modany and the Directors filed separate motions to dismiss for failure to state a claim [Dkt. Nos. 39, 40], and on January 29, 2020, the District Court granted the motion to dismiss filed by the Directors, but denied the motion to dismiss filed by Modany [Dkt. No. 69].

9. After extensive fact discovery, including substantial production of documents and numerous depositions, and expert discovery, Modany filed a motion for summary judgment [Dkt. No. 108], which was granted by the District Court on June 27, 2022 [Dkt. No. 175]. On the same date, the District Court entered a final order dismissing the action as to all Defendants and claims (the "Final Order") [Dkt. No. 176].

10. On July 22, 2022, the Trustee filed her notice of appeal to the Seventh Circuit Court of Appeals (the "Court of Appeals") with respect to the Final Order dismissing all claims against all Defendants [Dkt. No. 177]. On July 25, 2022, the appeal was docketed with the Court of Appeals as Case No: 22-2292 (the "Appeal").

11. The Trustee and the Defendants subsequently participated in mediation of all issues (the “Mediation”), as directed by an Order issued by the Court of Appeals on July 29, 2022, pursuant to Rule 33 of the Federal Rules of Appellate Procedure and Circuit Rule 33.

III. SETTLEMENT

12. As a result of the Mediation and the deliberations of the Trustee and the Defendants, and after consultation with their respective counsel, the parties have concluded that the compromise and settlement embodied in the Settlement Agreement attached hereto as **Exhibit B**, is fair and reasonable, and that it is in their respective best interests and the best interests of the Affiliated Debtors’ bankruptcy estates to resolve their disputes on the terms set forth in the Settlement Agreement, without any party admitting any liability therefor.

13. The Defendants’ Statement expressing the Defendants’ position regarding the District Court’s rulings in the District Court Case is attached to the Settlement Agreement as **Exhibit 1**.

14. As more specifically addressed in the proposed Settlement Agreement, it generally provides that:

- (a) The Settlement Agreement will not become effective (the “Effective Date”) until all of the following conditions precedent have occurred: (i) all of the parties have executed the Settlement Agreement; and (ii) entry of a final order approving the Settlement Agreement.
- (b) No later than thirty (30) days after the Effective Date, the Defendants shall jointly deliver, or cause to be delivered to the Trustee the sum of \$370,000.00 (the “Settlement Payment”). The day on which the Trustee receives the Settlement Payment shall be referred to as the “Receipt Date.”
- (c) No later than the fifth (5th) business day after the Receipt Date, the Trustee shall file with the Clerk of the Court of Appeals, pursuant to Federal Rule of Appellate Procedure 42(b), a copy of the signed Dismissal Agreement attached to the Settlement Agreement as **Exhibit 2**, dismissing the Appeal with prejudice pursuant to the terms of the Settlement Agreement and with each party to bear its own costs, expenses, and attorneys’ fees.

- (d) Modany filed Claim No. 2452 in ITT's bankruptcy for the total sum of \$5,008,199.00 for amounts due under ITT's Senior Executive Severance Plan. Claim No. 2452 includes \$12,850.00 as a section 507(a)(4) priority claim, and the remainder of the claim is a general unsecured claim. \$6,404.64 of \$12,850.00 shall be allowed as a section 507(a)(4) priority claim and \$5,001,794.36 shall be allowed as a general unsecured claim. The amount of Modany's section 507(a)(4) priority claim was arrived at by netting out the funds received by Modany under the WARN class action settlement. Modany shall not waive any right to distribution on account of Claim No. 2452 as a result of accepting and depositing payment received from the WARN class action settlement in the amount of \$6,445.36. Claim No. 846 filed by Modany in ITT's bankruptcy case shall be disallowed, having been subsequently amended and replaced by Claim No. 2452 in ITT's bankruptcy case. The Trustee shall not object to the allowance of Claim No. 2452, which shall be allowed as provided for herein. Modany shall not amend, modify or supplement the amount or priority of Claim No. 2452 in ITT's bankruptcy case, nor shall he assert any other claims in any of the bankruptcy cases filed by the Affiliated Debtors.
- (e) The proofs of claim filed by the Directors in ITT's bankruptcy case have previously either been withdrawn or disallowed, and the Directors shall not assert any other claims in any of the bankruptcy cases filed by the Affiliated Debtors.

IV. RELIEF REQUESTED

15. The Trustee requests entry of an order, substantially in the form as **Exhibit A**, pursuant to sections 105(a) and 363 of the Bankruptcy Code and Bankruptcy Rule 9019, (a) approving the terms of the Settlement Agreement, (b) authorizing the Trustee to enter into the Settlement Agreement, and (c) directing that the Court shall retain exclusive jurisdiction as to the Settlement Agreement.

V. GROUNDS FOR GRANTING RELIEF

16. A court may authorize a trustee to enter into a settlement so long as it is a sound exercise of the trustee's business judgment. *See* 11 U.S.C. § 363(b); *In re UAL Corp.*, 443 F.3d 565, 571 (7th Cir. 2006) (use under section 363 of the Bankruptcy Code must "[make] good business sense"); *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) (section 363 involves exercise of fiduciary duties and requires an "articulated business justification"); *see also In re*

Olde Prairie Block Owners, LLC, 448 B.R. 482, 492 (Bankr. N.D. Ill. 2011) (same). Moreover, when applying the “business judgment” standard to a use of estate property under section 363 of the Bankruptcy Code, a trustee’s judgment is “entitled to great judicial deference as long as a sound business reason is given.” *See In re Efoora, Inc.*, 472 B.R. 481, 488 (Bankr. N.D. Ill. 2012).

17. Similarly, Bankruptcy Rule 9019(a) permits a bankruptcy court to approve a trustee’s “compromise or settlement” after notice and a hearing, if such settlement is “fair and equitable . . . and in the best interests of the bankruptcy estate.” *Depoister v. Mary M. Holloway Found.*, 36 F.3d 582, 586 (7th Cir. 1994); *see also In re Energy Co-op., Inc.*, 886 F.2d 921, 927 (7th Cir. 1989) (“The benchmark for determining the propriety of a bankruptcy settlement is whether the settlement is in the best interest of the estate.”); *In re Smith*, No 02-16450-JKC-7A, 2008 Bankr. LEXIS 2821, *6 (Bankr. S.D. Ind. Sept. 10, 2008) (same). Settlements should be approved unless “the settlement ‘falls below the lowest point in the range of reasonableness.’” *In re Commercial Loan Corp.*, 316 B.R. 690, 698 (Bankr. N.D. Ill. 2004) (quoting *Energy Co-op.*, 886 F.2d at 929); *In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir. 2007); *see also In re Artra Grp., Inc.*, 300 B.R. 699, 702 (Bankr. N.D. Ill. 2003). Settlements and compromises are favored in bankruptcy because they expedite case administration and reduce unnecessary administrative costs. *Fogel v. Zell*, 221 F.3d 955, 960 (7th Cir. 2000). In determining whether a compromise is in the best interests of the estate, the Court must compare “the settlement’s terms with the litigation’s probable costs and probable benefits.” *In re Am. Reserve Corp.*, 841 F.2d 159, 161 (7th Cir. 1987); *see also Doctors Hosp.*, 474 F.3d at 426 (“Among the factors the court considers are the litigation’s probability of success, complexity, expense, inconvenience, and delay, including the possibility that disapproving the settlement will cause wasting of assets.” (internal quotation marks and citations omitted); *Commercial Loan*,

316 B.R. at 697 (holding that relevant factors a bankruptcy court should consider in approving a settlement include “the litigation’s probability of success, its complexity, and its ‘attendant expense, inconvenience and delay’” (quoting *Am. Reserve Corp.*, 841 F.2d at 161)).

18. Here, the Trustee, in the exercise of her business judgment, believes that the Affiliated Debtors’ bankruptcy estates should accept the settlement terms based on the merits of the Defendants’ defenses to the Appeal and the risk and expense to the Affiliated Debtors’ bankruptcy estates if the Appeal were to proceed. The Trustee believes entry into the Settlement Agreement is in the best interest of the Affiliated Debtors’ bankruptcy estates and represents a sound exercise of her business judgment. The various disputes between the parties are complex, and the outcome of the Appeal and underlying Adversary Proceeding is uncertain. Resolution of the Appeal, if it were to proceed, has the potential to, and likely will, prove costly and time consuming to all parties, and absent resolution of the issues covered by the Settlement Agreement, costs associated therewith will continue to accrue. Entry into the Settlement Agreement will resolve such issues consensually, bringing the Trustee another step closer to resolution of the bankruptcy cases.

19. For the foregoing reasons, the Trustee has determined, in the exercise of her sound business judgment, that the Settlement Agreement is fair, equitable, in the best interest of the Affiliated Debtors’ bankruptcy estates, and well within the range of reasonableness for approval under Bankruptcy Rule 9019(a). Accordingly, the Trustee submits that the Court should approve the settlement terms and the Trustee’s entry into the Settlement Agreement.

VI. NOTICE

20. Pursuant to the *Notice, Case Management and Administrative Procedures* (the “Case Management Procedures”) approved by the Court on October 4, 2016 [Doc 220], the Trustee will serve a copy of this motion, including the exhibits, on the following (as defined in

the Case Management Procedures): (a) the Core Group; (b) the Request for Notice List; (c) the Appearance List; and (d) counsel to the Defendants.

21. Due to certain scheduling conflicts, the Trustee is contemporaneously filing herewith a motion requesting that a hearing on the requested relief herein be set off the omnibus hearing schedule.

WHEREFORE, the Trustee respectfully requests entry of an order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein and granting the Trustee all other just and proper relief.

Respectfully submitted,

RUBIN & LEVIN, P.C.

By: /s/ Meredith R. Theisen

Meredith R. Theisen

Deborah J. Caruso (Atty. No. 4273-49)
Meredith R. Theisen (Atty. No. 28804-49)
RUBIN & LEVIN, P.C.
135 N. Pennsylvania Street, Suite 1400
Indianapolis, Indiana 46204
Tel: (317) 634-0300
Fax: (317) 263-9411
Email: dcaruso@rubin-levin.net
mtheisen@rubin-levin.net
Attorneys for Deborah J. Caruso, Trustee

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2022, a copy of the foregoing *Trustee's Motion to Compromise and Settle Certain Claims Asserted Against ITT's Former Chief Executive Officer and ITT's Former Board of Directors* was filed electronically. Pursuant to Section IV.C.3(a) of the Case Management Procedures, notice of this filing will be sent to the following parties through the Court's Electronic Case Filing System. Parties may access this filing through the Court's system.

John Joseph Allman jallman@hbkfirm.com, dadams@hbkfirm.com
Richard Allyn rallyn@robinskaplan.com
Robert N Amkraut ramkraut@foxrothschild.com
Scott S. Anders scott.anders@jordanramis.com, litparalegal@jordanramis.com
Reuel D Ash rash@ulmer.com, mure@ulmer.com

Todd Allan Atkinson todd.atkinson@wbd-us.com
George Bach george@georgebachlaw.com
Kay Dee Baird kbaird@kdlegal.com, rhobdy@kdlegal.com;crbpgpleadings@kdlegal.com
Christopher E. Baker cbaker@hbkfirm.com, thignight@hbkfirm.com
James David Ballinger jim@kentuckytrial.com, jennifer@kentuckytrial.com
Joseph E. Bant jebant@lewisricekc.com
William J. Barrett william.barrett@bfkn.com, mark.mackowiak@bfkn.com
Ashley Flynn Bartram ashley.bartram@oag.texas.gov
Alex M Beeman alex@beemanlawoffice.com, abeeman@reminger.com
Thomas M Beeman tom@beemanlawoffice.com
Richard James Bernard rbernard@foley.com
Thomas Berndt tberndt@robinskaplan.com, jgerboth@robinskaplan.com
John J Berry john.berry@dinsmore.com, Christina.Lee@DINSMORE.COM
Brandon Craig Bickle bbickle@gablelaw.com
Jill B. Bienstock jillbienstock@hotmail.com
Michael Blumenthal michael.blumenthal@hklaw.com
David J. Bodle dbodle@hhclaw.com, layres@hhlaw-in.com
Robert A. Breidenbach rab@goldsteinpressman.com
Wendy D Brewer wbrewer@fmdlegal.com, cbellner@fmdlegal.com
Kayla D. Britton kayla.britton@faegredrinker.com, noticeFRindy@faegrebd.com
Robert Bernard Bruner bob.bruner@nortonrosefulbright.com
Jason R Burke jburke@bbrlawpc.com, kellis@bbrlawpc.com
Erin Busch ebusch@nebraska.edu
John Cannizzaro john.cannizzaro@icemiller.com, julia.yankula@icemiller.com
Kevin M. Capuzzi kcapuzzi@beneschlaw.com,
lmolinaro@beneschlaw.com;docket@beneschlaw.com
James E. Carlberg jcarlberg@boselaw.com,
mwakefield@boselaw.com;kthompson@boselaw.com
Steven Dean Carpenter scarpenter1@dor.in.gov
Deborah Caruso dcaruso@rubin-levin.net, dwright@rubin-levin.net;cgilly@rubin-levin.net;atty_dcaruso@bluestylus.com
Deborah J. Caruso trustee caruso@rubin-levin.net,
DJC@trustesolutions.net;cdjc11@trustesolutions.net
Joshua W. Casselman jcasselman@rubin-levin.net, angie@rubin-levin.net;atty_jcasselman@bluestylus.com
Ben T. Caughey ben.caughey@merchocaughey.com
Sonia A. Chae chaes@sec.gov
John Andrew Chanin jchanin@lindquist.com, srummery@lindquist.com
Courtney Elaine Chilcote courtney@ckhattorneys.com,
ckh@ckhattorneys.com;tracy@ckhattorneys.com
Dale C Christensen christensen@sewkis.com
Eboney Delane Cobb ecobb@pbfc.com
Tiffany Cobb tscobb@vorys.com
Michael Edward Collins mcollins@manierherod.com
Michael Anthony Collyard mcollyard@robinskaplan.com, rhoule@robinskaplan.com
Eileen Connor econnor@ppsl.org
Lawrence D. Coppel lcoppel@gfrlaw.com

Heather M. Crockett Heather.Crockett@atg.in.gov, marie.baker@atg.in.gov
 J Russell Cunningham rcunningham@dnlc.net, reaster@dnlc.net
 Erica Dausch edausch@babstcalland.com
 Dustin R. DeNeal ddeneal@firstib.com,
 noticeFRindy@faegredrinker.com;faegrebddocket@faegredrinker.com
 Laura A DuVall Laura.Duvall@usdoj.gov, Catherine.henderson@usdoj.gov
 Annette England annette.english@btlaw.com
 Charles Anthony Ercole cercole@klehr.com, acollazo@klehr.com
 Carolyn Meredith Fast carolyn.fast@ag.ny.gov
 Elaine Victoria Fenna elaine.fenna@morganlewis.com
 Andrew W Ferich awf@chimicles.com
 Scott Patrick Fisher sfisher@drewrysimmons.com, lgarrison@DSVlaw.com
 John David Folds dfolds@bakerdonelson.com, sparson@bakerdonelson.com
 Jennifer N Fountain jfountain@iislw.com, sfilippini@iislw.com
 Sarah Lynn Fowler sfowler@bbrawlpc.com, kellis@bbrawlpc.com,SLF@trustesolutions.net
 Lauren Freeman lauren.freeman@doj.ca.gov
 Carlos Galliani carlos@thelidjifirm.com
 Jonathan William Garlough jgarlough@foley.com, mstockl@foley.com;mdlee@foley.com
 Lisa Giandomenico lgiandomenico@nmag.gov
 Lea Pauley Goff lea.goff@skofirm.com, emily.keith@skofirm.com
 John C Goodchild john.goodchild@morganlewis.com
 Douglas Gooding dgooding@choate.com, douglas-gooding-9991@ecf.pacerpro.com
 John Andrew Goodridge jagoodridge@jaglo.com, angray@jaglo.com;dwhiggs@jaglo.com
 Michael Wayne Grant michael.w.grant@doj.state.or.us
 Richard Grayson Grant rgrant@rgglaw.com, grantecf@gmail.com
 Alan Mark Grochal agrochal@tydingslaw.com
 Elizabeth N. Hahn ehahn@rubin-levin.net, mralph@rubin-levin.net
 Gregory Forrest Hahn ghahn@boselaw.com, jmcneeley@boselaw.com
 Julian Ari Hammond Jhammond@hammondlawpc.com, ppecherskaya@hammondlawpc.com
 Wallace M Handler whandler@swappc.com, kkloock@swappc.com
 William J. Hanlon whanlon@seyfarth.com,
 2875011420@filings.docketbird.com;bankruptcydocket@seyfarth.com
 Adam Craig Harris adam.harris@srz.com
 Jeffrey M. Hawkinson jhawkinson@pcslegal.com, danderson@pcslegal.com
 Michael J. Hebenstreit mhebenstreit@lewiskappes.com,
 ktierney@lewiskappes.com;pkerr@lewiskappes.com
 Amanda Marie Hendren amanda@indianalawgroup.com
 Claude Michael Higgins Michael.Higgins@ag.ny.gov
 Michael W. Hile mhile@jacobsonhile.com, assistant@jacobsonhile.com
 Sean M Hirschten shirschten@psrb.com
 Robert M. Hirsh rhirsh@lowenstein.com
 John C. Hoard johnh@rubin-levin.net, lking@rubin-
 levin.net;atty_jch@trustesolutions.com;sturpin@rubin-levin.net
 Curt Derek Hochbein chochbein@rubin-levin.net, kelly.paberzs@mbcblaw.com
 Jeffrey A Hokanson jeff.hokanson@icemiller.com,
 bgnotices@icemiller.com,david.young@icemiller.com
 Steven Howard Holinstat sholinstat@proskauer.com

Diana Hooley diana.hooley@state.ma.us
Thomas Ross Hooper hooper@sewkis.com
George Wade Hopper ghopper@cohenandmalad.com, kkeith@cohenandmalad.com
Andrew E. Houha bkecfnotices@johnsonblumberg.com
Andrew W. Hull awhull@hooverhullturner.com, fgipson@hooverhullturner.com
James C Jacobsen jjacobsen@nmag.gov, eheltman@nmag.gov
Christine K. Jacobson cjacobson@jacobsonhile.com,
5412@notices.nextchapterbk.com, 9992889420@filings.docketbird.com
Jay Jaffe jay.jaffe@faegredrinker.com, noticeFRindy@faegrebd.com
David Januszewski djanuszewski@cahill.com
Benjamin F Johns bfj@chimicles.com, klw@chimicles.com
Russell Ray Johnson russj4478@aol.com
Kenneth C. Jones kcjones@lewisricekc.com
Anthony R. Jost tjost@rbelaw.com, rmccclintic@rbelaw.com
Aaron Kappler akappler@tokn.com
Timothy Q. Karcher tkarcher@proskauer.com
Steven Joseph Kasyjanski sjk-yount-atty@ameritech.net, skasyjan@gmail.com
Alan Katz akatz@lockelord.com
Richard B. Kaufman richardkfmn@gmail.com
John M. Ketcham jketcham@psrb.com, scox@psrb.com
Taejin Kim tae.kim@srz.com
Edward M King tking@fbtlaw.com, lsugg@fbtlaw.com; tking@ecf.inforuptcy.com
Roy F. Kiplinger bankruptcy@kiplingerlaw.com, bankruptcy@kiplingerlaw.com
J. Taylor Kirklin taylor.kirklin@usdoj.gov, melanie.crouch@usdoj.gov
James A. Knauer jak@kgrlaw.com, tjf@kgrlaw.com
Kevin Dale Koons kkoons@kgrlaw.com, cjh@kgrlaw.com
Harris J. Koroglu hkoroglu@shutts.com, fsantelices@shutts.com
Lawrence Joel Kotler ljkotler@duanemorris.com
Robert R Kracht rrk@mccarthylebit.com
Andrew L. Kraemer akraemer@johnsonblumberg.com, akraemerlawoffice@att.net
David R. Krebs dkrebs@hbkfirm.com, dadams@hbkfirm.com
Jerrold Scott Kulback jkulback@archerlaw.com
Jay R LaBarge jlabarge@stroblpc.com
Darryl S Laddin bkrfilings@agg.com
Michael J. Langlois mlanglois@shouselanglois.com, rshouse@shouselanglois.com
Vilda Samuel Laurin slaurin@boselaw.com
Jordan A Lavinsky jlavinsky@hansonbridgett.com
Todd Evan Leatherman todd.leatherman@ky.gov
David S Lefere dlefer@mikameyers.com, jfortney@mikameyers.com
Anthony Darrell Lehman alehman@hlpwlaw.com
Martha R. Lehman mlehman@smithamundsen.com,
marthalehman87@gmail.com; ispells@salawus.com; lengl@salawus.com
Gary H Leibowitz gleibowitz@coleschotz.com,
pratkowiak@coleschotz.com; gleibowitz@coleschotz.com
Donald D Levenhagen dlevenhagen@landmanbeatty.com
Elizabeth Marie Little elizabeth.little@faegredrinker.com,
noticeFRindy@faegredrinker.com; anita.sery@faegredrinker.com; docketgeneral@faegredrinker.

com;beth.olivere@faegredrinker.com
Edward J LoBello elobello@msek.com
Melinda Hoover MacAnally Melinda.MacAnally@atg.in.gov,
Carrie.Spann@atg.in.gov;Kenyatta.Peerman@atg.in.gov
John A. Majors jam@morganandpottinger.com, majormajors44@yahoo.com
Steven A. Malcoun dsmith@mayallaw.com
John Marshall JMarshall@JMPartnersLLC.com
Jonathan Marshall jmarshall@choate.com, jonathan-marshall-4638@ecf.pacerpro.com
Thomas Marvin Martin tmmartin@lewisricekc.com
Jeff J. Marwil jmarwil@proskauer.com
Charles Edward Massey mbracken@nkylawyers.com, cedmassey@nkylawyers.com
Ann Wilkinson Matthews amatthews@ncdoj.gov
Rachel Jaffe Mauceri rmauceri@rc.com
Sarah Thomas Mayhew sarah.t.mayhew@usdoj.gov, northern.taxcivil@usdoj.gov
Melissa J. McCarty mdegroff@kgrlaw.com, cresler@kgrlaw.com
Michael K. McCrory mmccrory@btlaw.com, bankruptcyindy@btlaw.com
Maureen Elin McOwen molly.mcowen@cfpb.gov
Harley K Means hkm@kgrlaw.com,
kwhigham@kgrlaw.com;cjs@kgrlaw.com;tfroelich@kgrlaw.com
Toby Merrill toby.merrill@ed.gov, ppsl@law.harvard.edu
Robert W. Miller rmiller@manierherod.com
Sherry Millman smillman@stroock.com
Jason Milstone jason.milstone@cmsenergy.com
Thomas E Mixdorf thomas.mixdorf@icemiller.com, brandy.matney@icemiller.com
James P Moloy jmoloy@boselaw.com,
dlingenfelter@boselaw.com;mwakefield@boselaw.com
Ronald J. Moore Ronald.Moore@usdoj.gov
Hal F Morris hal.morris@oag.texas.gov
Michael David Morris michael.morris@ago.mo.gov
Kevin Alonzo Morrissey kmorrissey@lewis-kappes.com, soliver@lewis-
kappes.com;leckert@lewis-kappes.com;kwilliams@lewis-kappes.com
Whitney L Mosby whitney.mosby@dentons.com,
faith.wolfe@dentons.com;nancy.branham@dentons.com
C Daniel Motsinger cmotsinger@kdlegal.com,
cmotsinger@kdlegal.com;rhobdy@kdlegal.com;crbpgpleadings@kdlegal.com
Lee Duck Moylan lmoylan@klehr.com, acollazo@klehr.com
Joseph L. Mulvey joseph@mulveyllc.com, linda@mulveyllc.com
Abraham Murphy murphy@abrahammurphy.com
Justin Scott Murray jmurray@atg.state.il.us
Alissa M. Nann anann@foley.com, DHeffer@foley.com
Henry Seiji Newman hsnewman@dglaw.com
Kevin M. Newman knewman@menterlaw.com, kmnbk@barclaydamon.com
Cassandra A. Nielsen cnielsen@rubin-levin.net,
atty_cnielsen@bluestylus.com,mralph@rubin-levin.net;lking@rubin-levin.net
Ryan Charles Nixon rcnixon@lamarcalawgroup.com
Isaac Nutovic inutovic@nutovic.com
Michael O'Donnell mike.odonnell@nortonrosefulbright.com

Gregory Ostendorf gostendorf@scopelitis.com, agregory@scopelitis.com
 Weston Erick Overturf wes@ofattorneys.com,
 deidre@ofattorneys.com;overturf.westonb115224@notify.bestcase.com
 Pamela A. Paige ppaige@plunkettcooney.com, amiller@plunkettcooney.com
 Eric Pendergraft ependergraft@slp.law, dwoodall@slp.law;bss@slp.law
 Danielle Ann Pham danielle.pham@usdoj.gov
 Anthony Pirraglia anthony.pirraglia@hklaw.com
 Jack A Raisner jar@raisnerroupinian.com, rrlp@ecf.courtdrive.com
 Jonathan Hjalmer Reischl jonathan.reischl@cfpb.gov
 Michael Rella MichaelRella@dwt.com
 Caroline Ellona Richardson caroline@paganelligroup.com,
 robin@paganelligroup.com;buffy@paganelligroup.com
 James Leigh Richmond James.Richmond@fldoe.org
 John M. Rogers johnr@rubin-levin.net, cgilly@rubin-levin.net;atty_rogers@bluestylus.com;lking@rubin-levin.net
 Melissa M. Root mroot@jenner.com, wwilliams@jenner.com
 David A. Rosenthal darlaw@nlci.com
 James E Rossow jim@rubin-levin.net, mralph@rubin-levin.net;ATTY_JER@trustesolutions.com
 Rene Sara Roupinian rsr@raisnerroupinian.com, warnlawyers@raisnerroupinian.com;jenny--hoxha--5459@ecf.pacerpro.com;rllp@ecf.courtdrive.com
 Victoria Fay Roytenberg vroytenberg@ppsl.org, eschmidt@law.harvard.edu
 Steven Eric Runyan ser@kgrlaw.com
 Karl T Ryan info@ryanesq.com, kryan@ryanesq.com
 Joseph Michael Sanders jsanders@atg.state.il.us
 Thomas C Scherer thomas.scherer@dentons.com, faith.wolfe@dentons.com
 James R. Schrier jrs@rtslawfirm.com, jar@rtslawfirm.com
 Ronald James Schutz rschutz@robinskaplan.com
 H. Jeffrey Schwartz jschwartz@robinskaplan.com
 Courtney Michelle Scott cscott1@dor.in.gov
 Joseph E Shickich jshickich@foxrothschild.com, vmagda@foxrothschild.com
 Mary Alexandra Shipley ashipley@mcguirewoods.com
 William Shotzbarger wshotzbarger@duanemorris.com
 Randall R Shouse rshouse@shouselanglois.com, mlanglois@shouselanglois.com
 John Deitch Sigel jsigel@ppsl.org
 William E Smith wsmith@k-glaw.com, cshaughnessy@k-glaw.com
 Lauren C. Sorrell lsorrell@kdlegal.com,
 ayeskie@kdlegal.com;cmotsinger@kdlegal.com;shammersley@kdlegal.com
 Berry Dan Spears berrydspears616@gmail.com
 Catherine L. Steege csteege@jenner.com,
 mhinds@jenner.com;thooker@jenner.com;aswingle@jenner.com
 LaChelle Stepp lstepp@steppjaffe.com, lastepp@yahoo.com
 Jason V Stitt jstitt@kmklaw.com
 Sharon Stolte sstolte@sandbergphoenix.com
 Jesse Ellsworth Summers esummers@burr.com, sguest@burr.com
 Matthew G. Summers summersm@ballardspahr.com, lanoc@ballardspahr.com
 Jonathan David Sundheimer jsundheimer@btlaw.com

Nathan L Swehla nswehla@graydon.law
Nancy K. Swift nswift@buchalter.com, cbohnsack@buchalter.com
Andrew W.J. Tarr atarr@robinsonbradshaw.com,
jrobey@robinsonbradshaw.com, docketing@robinsonbradshaw.com
Eric Jay Taube eric.taube@wallerlaw.com,
annmarie.jezisek@wallerlaw.com; sherri.savala@wallerlaw.com
Meredith R. Theisen mtheisen@rubin-levin.net, dwright@rubin-levin.net; mcruser@rubin-levin.net
Meredith R. Theisen mtheisen@rubin-levin.net,
atty_mtheisen@bluestylus.com; mralph@rubin-levin.net; cgilly@rubin-levin.net
Jessica L Titler jt@chimicles.com
David Tocco djtocco@vorys.com, mdwalkuski@vorys.com
Todd Christian Toral todd.toral@dlapiper.com, todd-toral-9280@ecf.pacerpro.com
Ronald M. Tucker rtucker@simon.com, cmartin@simon.com, bankruptcy@simon.com
Christopher Turner christopher.turner@lw.com, DCItiserv@lw.com
Michael Tye michael.tye@usdoj.gov
U.S. Trustee ustpregion10.in.ecf@usdoj.gov
Lauren Valkenaar lvalkenaar@chasnoffstribling.com
Sally E Veghte sveghte@klehr.com, acollazo@klehr.com
Rachel Claire Verbeke rverbeke@stroblpc.com
Aimee Vidaurri aimee.vidaurri@nortonrosefulbright.com
Amy L VonDielingen amy.vondielingen@woodenlawyers.com
Amy E Vulpio vulpioa@whiteandwilliams.com
Carolyn G. Wade Carolyn.G.Wade@doj.state.or.us
Christopher D Wagner cwagner@hoooverhullturner.com
Louis Hanner Watson louis@watsonnorris.com
Jeffrey R. Waxman jwaxman@morrisjames.com,
jdawson@morrisjames.com; wweller@morrisjames.com
Philip A. Whistler philip.whistler@icemiller.com, holly.minnis@icemiller.com
Bradley Winston bwinston@winstonlaw.com, lwheaton@winstonlaw.com
Brandon Michael Wise bwise@prwlegal.com
Cathleen Dianne Wyatt cwyatt@fbtlaw.com, tacton@fbtlaw.com
James T Young james@rubin-levin.net, lking@rubin-levin.net; atty_young@bluestylus.com
James E. Zoccola jzoccola@lewis-kappes.com

I further certify that on September 26, 2022, pursuant to Section IV.C.3(c) of the Case Management Procedures, a copy of the foregoing *Trustee's Motion to Compromise and Settle Certain Claims Asserted Against ITT's Former Chief Executive Officer and ITT's Former Board of Directors* was emailed to the following:

CEC Red Run, LLC: Alan M. Grochal at agrochal@tydingslaw.com
SWRE Deal V Building, LLC: Paul Weiser at pweiser@buchalter.com
Tarrant County/Dallas County: Elizabeth Weller at dallas.bankruptcy@publicans.com
Northwest Natural Gas Company: Ashlee Minty at Ashlee.Minty@nwnatural.com
Solar Drive Business, LLC: Chris W. Halling at challing@hallingmeza.com
Market-Turk Company: Jordan A. Lavinsky at jlavinsky@hansonbridgett.com
Taxing Authority for Harris County, Texas: John P. Dillman at houston_bankruptcy@lgbs.com

Texas Comptroller of Public Accounts: Rachel Obaldo at rachel.obaldo@oag.texas.gov
Clear Creek Independent School District: Carl O. Sandin at csandin@pbfc.com
Synchrony Bank: Recovery Management Systems Corporation at claims@recoverycorp.com
Bexar County: Don Stecker at sanantonio.bankruptcy@publicans.com
SWRE Deal V Building, LLC: Nancy K. Swift at nswift@buchalter.com
TN Dept. of Revenue: Michael Willey at michael.willey@ag.tn.gov
Florida Department of Education: Benman D. Szeto at benman.szeto@fldoe.org
Last Second Media, Inc.: T. Todd Egland at tegland@beldenblaine.com
Hung Duong: Kevin Schwin at kevin@schwinlaw.com
Travis County: Kay D. Brock at kay.brock@traviscountytexas.gov
Able Building Maintenance: Scott D. Fink at bronationalecf@weltman.com
Marathon Ventures, LLC: Daniel M. Karger at kargerlaw@gmail.com
Oklahoma County Treasurer: Tammy Jones at tammy.jones@oklahomacounty.org
JM Partners LLC: John Marshall at jmarshall@jmpartnersllc.com
Modany: Joseph P. Davis III at davisjo@gtlaw.com, Kevin D. Finger at fingerk@gtlaw.com,
Mian R. Wang at wangm@gtlaw.com, Alison T. Holdway at holdwaya@gtlaw.com and David
Ian Miller at david.miller@gtlaw.com
Directors: Gregory F. Hahn at ghahn@boselaw.com and Paul D. Vink at pvink@boselaw.com

/s/ Meredith R. Theisen

Meredith R. Theisen

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